No. 76-445

In the Supreme Court of the United States

OCTOBER TERM, 1976

LONDON PRESS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1976. A petition for rehearing was denied on August 30, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on September 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the facts of this case, petitioners were prejudiced because their obscenity convictions for acts committed and tried prior to *Miller* v. *California*, 413 U.S. 15, were based on the then prevailing national community standard.

2. Whether the government failed to prove scienter because petitioners' knowledge of the contents of the mailed material was stipulated but there was no other proof that petitioners knew the materials' "character and nature."

STATEMENT

After a jury-waived trial in the United States District Court for the Central District of California, petitioners, five corporations, were convicted on multiple counts of conspiring to mail obscene material, in violation of 18 U.S.C. 1461. Petitioner London Press, Inc., a printer, was also convicted as an aider and abetter on twenty-four substantive counts charging actual mailings. London Press was fined a total of $34,000 and costs, and the other petitioners were fined $10,000 and costs. The court of appeals affirmed (Pet. App. A).

The materials mailed included advertising brochures, a book entitled "Sexscope", and a magazine entitled "Foreplay" depicting nude males and nude females engaged in intercourse, fellatio and cunnilingus (Govt. Exs. 6-10, 13-31). The offenses and the trial took place prior to this Court's decision in *Miller* v. *California*, 413 U.S. 15. The district court applied the standard of obscenity defined in *Roth* v. *United States*, 354 U.S. 476, as modified by the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413.

Prior to trial the parties, with the approval of the court, stipulated (Govt. Ex. 32) that petitioners had knowledge of the contents of, and had agreed to mail the advertisements, books and magazines referred to in the various counts; and that various persons listed would be deemed to have testified as witnesses that they received the materials by mail (Pet. 5). In response to a request for a bill of particulars asking whether the government claimed that the materials exceeded community standards and appealed to the

prurient interest of the average person "in the nation as a whole," the government replied in the affirmative (Pet. 4-5). At trial expert witnesses for both the government and petitioners testified on the assumption that a national standard was at issue (Pet. 6) and the district court applied that standard in finding that seven items were obscene (Pet. 10-11).

Petitioners' appeal was decided subsequent to this Court's decisions in *Miller, supra,* and *Hamling* v. *United States,* 418 U.S. 87. After the court of appeals had considered supplemental briefs on the effect of these decisions (Pet. 13), the court issued a brief memorandum opinion holding, *inter alia,* that under its *en banc* decision in *United States* v. *Cutting,* 538 F. 2d 835 (C.A. 9), petition for a writ of certiorari pending, No. 76-10, the district court's reliance on national standards was harmless error (Pet. App. A).

ARGUMENT

1. Petitioners' contention that their convictions are invalid because the case was tried under a national standard is foreclosed by *Hamling* v. *United States,* 418 U.S. 87. In that case, as here, the trial occurred prior to *Miller*; consequently, a national standard was applied. This Court nevertheless affirmed the convictions, holding that there was no constitutional requirement that the obscenity of challenged materials be judged by the standards of a "precise geographic area" (418 U.S. at 105), that a pre-*Miller* conviction is invalid only if a defendant was "materially prejudiced" by trial under a national standard (*id.* at 107), and that there is no such prejudice unless "there is a probability that the excision of the references to the nation as a whole in the instruction dealing with the community standards would have materially affected the deliberations of the jury." *Id.* at 108. There was no such prejudice here, as shown by the court of appeals' *en banc*

decision in *United States* v. *Cutting, supra,* and the government's brief in opposition to the petition in that case at p. 8 (No. 76-10),[1] upon which we rely here.

The fact that trial here was by the court rather than by a jury does not place this case on a different footing from *Hamling* or *Cutting*. Just as a judge may substitute for a jury in cases in which the verdict must be determined on the basis of the propensities of a "reasonable" person, so too may he act in the same manner as a jury in determining the reactions of the average person, applying contemporary community standards. Contrary to petitioners' argument, nothing in the record indicates that the judge was unable so to act. Petitioners' assertions that he "specifically refused to draw on his own knowledge of the views of the average person in the community" and "implicitly stated that he did *not* know the limits of sexual candor and relied exclusively on the testimony of the experts in making his determination" (Pet. 16, emphasis in original) is not supported by the citations (Tr. 1447, 1529). The judge's remarks merely reflect the judge's realization that, like jurors, he could not decide the case on the basis of his own personal opinion of the material. See Pet. 10-11.

Indeed, as petitioners concede (Pet. 10), "[t]he trial judge made it clear that he was basing his opinion on the law and the evidence in the case as he understood it, and not on his personal views concerning the material." Thus, the "contemporary community standards" served its proper function in this case of insuring that the trier of fact apply an objective rather than a subjective standard. Although *Miller* rejected the view that the constitutional definition of obscenity be based on uniform national standards, the Court also ruled that no "precise geographic area is required

[1]We are serving copies of the brief in opposition upon counsel for petitioners in this case.

as a matter of constitutional law." *Hamling* v. *United States, supra,* 418 U.S. at 105. The critical element is that defendant be afforded an objective evaluation of the obscenity *vel non* of the material, and that was done in this case.

Furthermore, "the excision of the references to the 'nation as a whole' * * * would [not] have materially affected" (*id.* at 108) the outcome of the trial. "The purpose of the 'community standards' instruction is not to distinguish attitudes in one area from those in another, but rather to distinguish personal or aberrant views from the generalized view of the community at large." *United States* v. *Cutting, supra,* 538 F. 2d at 841.

Although the trier of fact "is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes" (*Hamling* v. *United States, supra,* 418 U.S. at 104) and as a result will apply the "local" attitudes because of the limited area from which the jury is drawn, this does not make the obscenity standard any more a geographic one than tests involving knowledge of the propensities of a reasonable person in other areas of the law.

The government here did not attempt to show that the national standard was stricter than the local community standard, nor did the trial court as trier of fact rely upon his personal attitudes towards the material in issue. Compare *United States* v. *Hensqn,* 513 F. 2d 156 (C.A. 9). Both parties correctly assumed that under the then-prevailing *Roth-Memoirs* test the national standard was the proper one. Neither petitioner nor the government attempted to show a different or less strict local standard.[2]

[2]Petitioners' reliance upon *United States* v. *Obscene Magazines, Film and Cards,* 541 F. 2d 810 (C.A. 9), is misplaced. There the Ninth Circuit simply held that the trial judge, as the trier of fact, properly found that the materials did not offend the community standards of the Los

Petitioners argue that the government's statement in its bill of particulars that the material was obscene under a national standard precluded them from demonstrating that it was not obscene under a more liberal local standard. But the statement merely set forth the government's theory of the case—in which petitioners apparently concurred—and did not prevent petitioners from offering evidence under a different theory.

2. Petitioners contend that the record does not establish scienter because they stipulated only knowledge of the contents of the materials, not knowledge of the materials' "character and nature." They rely upon this Court's statement in *Hamling, supra,* that "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials". 418 U.S. at 123. But when these corporations stipulated knowledge of the contents of the advertisements, books and magazines involved in this case, they necessarily admitted knowledge of the character and nature of those materials. Compare *Smith* v. *California*, 361 U.S. 147, 152-153.

Petitioners' argument that the government failed to prove "guilty knowledge" (Pet. 27) in the face of their admission is simply a claim that the Constitution requires proof of a defendant's knowledge of the legal status of the materials. That contention is foreclosed by *Hamling*, 418 U.S. at 123. Moreover, no greater degree of "guilty knowledge" is required because petitioners were convicted of conspiring to violate 18 U.S.C. 1461, or, in the case of London Press, of aiding or abetting such a violation. Cf. *United States* v. *Feola*, 420 U.S. 671.

Angeles area notwithstanding the possibility that another factfinder could have reached the opposite conclusion. The possibility of divergent opinions as to the obscenity *vel non* of sexually explicit material exists in every obscenity prosecution.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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